SUPREME COURT OF THE UNITED STATES.

No. 284

ALBERT G. EWING, E. H. EWING, JR., JOHN H. EWIN, AND J. T. PENDLETON, PLAINTIFFS IN ERROR,

vs.

M. H. HOWARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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1 MIDDLE DISTRICT OF TENNESSEE:

At a Circuit Court of the United States, for the said district begun and held at the capitol of said State, in the city of Nashville, on the third Monday, being the fifteenth day of April, Anno Domini, 1897, and of the Independence of the United States, the 91st year.

Present, the Honorable Connally F. Trigg, United States district judge for the several districts of Tennessee.

The following proceedings were had, to wit: On the 13th day of March, 1866, the following summons is said, to wit:

Summons.

M. H. HOWARD
v.
A. G. EWING, E. H. EWING, JOHN H. Ewin and J. T. Pendleton. } 1,003.

The President of the United States of America to the Marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summond Abbert G. Ewing, E. H. Ewing, jun'or of the firm of Ewing & Sperry, and E. H. Ewing, & Co., and John H. Ewin and J. T. Pendleton, both the latter partners in trade as Ewin, Pendleton, & Co., all citizens of the State of
2 Tennessee, if they be found in your district, to be and appear before the judges of the Circuit Court of the United States, in the sixth circuit for the district of middle Tennessee, at the "Federal Court room" at Nashville, in said State, on the third Monday in April, next, then and there to answer M. H. Howard, a citizen of the State of New York, in an action to their damage fifteen thousand dollars, which they owe to, and unjustly detain from him.

Herein fail not; and have then and there this writ.

Witness S. P. Chase, esq., Chief Justice of the Supreme Court of the United States, this the third Monday in October, in the year of our Lord eighteen hundred and sixty-five, and of the independence of the United States, the 90th.

[SEAL.] E. R. CAMPBELL, *Clerk.*

Return.

Came to hand same day issued, executed upon the defendants, A. G. Ewing, E. H. Ewing, John H. Ewin and J. T. Pendleton, and delivered to each a copy of the declaration, March 15th, 1866.

E. R. GLASCOCK, *M. M. D. T.*

On the 13th day of March, 1866, a prosecuting bond was
3 filed, which is in the following words and figures, to wit:

Circuit Court of the U. S. for the middle district of Tennessee.

Prosecution Bond.

M. H. HOWARD
v.
ALBERT G. EWING and others. } 1003.

Know all men by these presents, that we, M. H. Howard and J. B. White, are held and firmly bound unto Albert G. Ewing, *et als.* in the penal sum of one hundred dollars, to the payment whereof we bind ourselves, and each of us, and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands on this the 13th day of March, 1866.

The condition of the above is such, that the said M. H. Howard, hath commenced suit against Albert G. Ewing *et als.* for trespass on the case to plaintiff's damage $10,000.

Now, if the said M. H. Howard, shall prosecute said suit with effect, or on failure thereof, pay and satisfy all costs that may be adjudged against said plaintiff in said cause, or on failure of said defendants, if convicted, to pay and satisfy said costs, if the said plaintiff shall pay the same, then this bond to be void, otherwise to remain in full force and virtue.

4 J. B. WHITE.

On the 13th day of March a declaration was filed, which is in the following words and figures, to wit:

Circuit Court of the United States for the middle district of Tennessee, setting at Nashville.

Declaration.

M. H. HOWARD
v.
A. G. EWING *et als.* } April term, 1866.

M. H. Howard, a citizen of the State of New York, sues Albert G. Ewin, H. Ewing, jr., of the firm of Ewing & Sperry and E. H. Ewing & Co., John H. Ewin and J. T. Pendleton, the two latter of the firm of Ewin, Pendleton & Co., all of whom are citizens of the State of Tennessee, in an action to his damage fifteen thousand dollars.

For that whereas, heretofore, on the 15th day of November, 1860, the said defendants, in the city of Nashville, made and executed a certain promissory note of that date here shown to the court, wherein and whereby they jointly and severally undertook and promised to

pay to the plaintiff at the Planter's Bank of Tennessee, at Nashville, on or by the 15th day of April, 1861, the sum of three thousand three hundred and thirty-three and 30-100 dollars, with interest thereon at the rate of ten per cent. per annum, from and after the first day of September, 1860, for value received in loaned money; and the said E. H. Ewing, signed said note, by the firm name and style of E. H. Ewing & Co., of which firm he was then a member; and the
5 said John H. Ewin; and said J. T. Pendleton, signed said note by the firm name and style of Ewing, Pendleton & Co., of which firm they were then partners, and no other member of either of said firms are known to the plaintiff, or are residents of the middle district of Tennessee, and the same was delivered to the plaintiff.

Whereas, afterwards, on the 11th day of April, 1859, the said defendants made and executed another and second promissory note of that date, here shown to the court, signed by the said Albert G. Ewing, as A. G. Ewing, by the said E. H. Ewing, jr., by his firm, name, and style of Ewing, Sperry and Co., of which firm he was a member and a partner, and by the said John H. Ewin and J. T. Pendleton, by their firm name of Ewin, Pendleton & Co., of which firm they were the partners, and none other partners of either of said firms are known to the plaintiff, or live within the district afore said, whereby the said defendants jointly and severally promised to pay to the plaintiff, or his order, on or by the 2nd day of November, 1861, the sum of thirty-six hundred and eighty-seven and 76-100 dollars for value received, and thus delivered the same to the plaintiff.

The plaintiff now alledges that the said defendant, or either of them, have never paid either of the sums described and men-
6 tioned in the declaration, or any part thereof, though payment has been frequently demanded according to the effect and tenor of their said promise, to his damage fifteen thousand dollars; therefore he sues.

J. B. WHITE & EAST, *Att'ys.*

Copy note.

$3,687 76-100. NASHVILLE, *April 11th*, '50.

On or by the 2nd day of November, A. D. 1861, we, or either of us, promise to pay M. H. Howard or order thirty-six hundred dollars and eighty-seven and 76-100 dollars. Value received.

A. G. EWING.

EWING & SPERRY, *Security.*
EWIN, PENDLETON & CO., *Security.*

On the back of the above note is the following credit, to wit:

June 3d, 1862, rec'd of J. O. McCrory, in Planters' Bank notes, $1,450, and in Union Bank notes, $550, making together two thousand dollars on the within note, for which gave him a separate receipt.

M. H. HOWARD.

O. Ewing's guarrante.

For value rec'd of M. H. Howard, I hereby covenant and agree with him to guarrantee to him the payment of a note for thirty-six hundred and eighty-seven and 76-100 ($3,687 76) dollars, dated Ap'l 11, 1861, and signed by A. G. Ewing, and Ewing & Sperry, security, and Ewin, Pendleton & Co., security.

Nashville, Ap'l 11, 1859.

O. EWING.

7 $3,333 30-000. *Note.*

On or by the 15th day of April next, we, or either of us, promise to pay to W. H. Howard, or order, at the Planter's Bank of Tennessee, at Nashville, three thousand three hundred and thirty-three dollars and thirty cents, with interest at the rate of ten per cent. per annum, from and after the first day of September last until paid. Value received this 15th day of November, 1860.

A. G. EWING.

E. H. EWING & CO., *Security.*

EDWIN PENDLETON & CO., *Security.*

O. Ewing's guarantee.

Value received of W. H. Howard, I hereby covenant and agree with him to guarantee to him, or his order, the payment of a note for three thousand three hundred and thirty-three dollars and thirty cents, executed to him by my son, A. G. Ewing, with E. H. Ewing & Co., and Ewing Pendleton & Co., securities, dated the 15th day of November, 1860, and made payable on or by the 15th day of April next, at the Planter's Bank of Tennessee at Nashville, with ten per cent. interest thereon, from and after the first day of September last, until paid, said note being for money loaned heretofore by said Howard to my said son at my instance and request. Value received.

Witness my hand this 15th day of November, 1860.

O. EWING.

On the 18th day of April, a plea was filed, which is in the following words, to wit:

Circuit Court of the United States for the Middle District of Tennessee, sitting at Nashville.

Plea.

8 M. H. HOWARD, a citizen of the State of New York,
v.
ALBERT G. EWING, EDWIN H. EWING, Jr. John H. Ewin, and J. T. Pendleton, citizens of the State of Tennessee. } 1,003.

And the said defendants, by attorney, come and defend the wrong and injury when, &c., and say that they do not owe the said sums of

money above demanded, nor any penny thereof in manner and form as the said plaintiff hath above thereof complained against them, and of this the said defendants put themselves upon the country.

RICE & THOMPSON, *Atty's.*

Issue.

And the plaintiff doth the like.

EAST & WHITE.

On the 23d day of April, 1866, a judgment was rendered in this cause, which is in the following words and figures, to wit:

Judgment.

M. H. HOWARD
v.
ALBERT G. EWING, E. H. EWING, JOHN H. Ewin, and J. T. Pendleton. } 1,003.

The parties appear by their attorneys and thereupon came a jury of good and lawful men, to wit: Thomas Comer, C. P. Hall, Jackson Todd, J. B. Kimbro, R. T. Warner, G. T. Coit, Joshua Flowers, G. W. M. Murry, J. D. Knowles, J. H. Sykes, Ruse W. Porter, and C. L. Temple, who being elected, tried and sworn, the truth to speak upon the issue joined in this cause, upon their oaths, do say
9 that they find the issue in favor of the plaintiff, and that the plaintiff has sustained damages by reason of the non-performance of the promises, and undertakings in the declaration mentioned, amounting to the sum of ($9,902 05) nine thousand nine hundred and two 5-100 dollars.

It is, therefore, considered by the court, that the plaintiff recover of the defendants the damages aforesaid, by the jury aforesaid assessed, and the costs of this suit, and that fi fa issue.

On the 27th day of April, 1866, an entry was made on the minute book, which is in the following words and figures, to wit:

Order remitting $2,445 60.

M. H. HOWARD
vs.
ALBERT G. EWING, E. H. EWING, John H. Ewin, and J. T. Pendleton. } 1,003.

The plaintiff appear, by his attorney, and remits the sum of ($2,445 60) two thousand four hundred and forty-five 60-100 dollars; said amount to be credited on the judgment rendered in this cause, on the 23d inst., a mistake of that sum having been made in the calculations.

On Monday morning, May 16th, 1866, the following entry was made, to wit:

10 *Motion for new trial.*

M. H. HOWARD
vs.
A. G. EWING *et. als.* } 1,003.

The defendants appear by their atto., and moved the court for a new trial of this cause, which is continued over for argument, and this cause continued until the next term.

On the 24th day of April, 1867, an entry was made on the minute book, which is as follows, to wit:

Continuance.

M. H. HOWARD
vs.
A. G. EWING *et. als.* } 1,003.

On account of the absence of defendants' counsel this cause is continued.

On the 20th day of April, 1867, an entry was made on the minute book, which is as follows, to wit:

Setting aside continuance, and overruling motion for new trial.

M. H. HOWARD
v.
A. G. EWING *et al.* } 1003.

Upon motion of the parties by their attorneys, the order at a former day of this term continuing this cause until the next term was set aside, and thereupon the motions for a new trial and in arrest of judgment were by this court overruled.

On the 4th day of May, 1867, the following order was entered on the minutes, to wit:

11 *Bill exception made part of record.*

M. H. HOWARD
vs.
A. G. EWING, *et al.* } 1,003.

This day came the defendants, by their attorney, and presented a bill of exceptions, which was signed, sealed, and ordered by the court to be made a part of the record.

On the 6th May, 1867, gave bond, and filed the same in the clerk's office, which appeal bond is in the words and figurs following, to wit:

Circuit Court of the United States for the sixth circuit and middle district of Tennessee.

Appeal Bond.

A. G. EWING, E. H. EWING, JOHN H. EWIN, and J. T. PENDLETON, plaintiffs in error,
vs.
M. H. HOWARD, defendant in error.

Know all men by these presents, that we, Albert G. Ewing. E. H. Ewing, jr., John H. Ewin, and J. T. Pendleton, principals, and Henry Ewing, and Orville Ewing, jr., are held firmly bound unto the above named M. H. Howard, in the sum of ($19,804 10), nineteen thousand eight hundred and four 10-100 dollars, to be paid to the said M. H. Howard his executors or administrators.

To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our
12 heirs, executors, and administrators, firmly by these presents Sealed with our seals and dated this sixth day of May, Anno Domini, 1867.

Whereas, the said Albert G. Ewing, E. H. Ewing, jr., John H. Ewin, and J. T. Pendleton, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the middle district of Tennessee.

Now, therefore, the condition of this is such, that if the above-named Albert G. Ewing, E. H. Ewing, jr., John H. Ewin, and J. T. Pendleton, shall prosicute their said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL]	ALBERT G. EWING.
[SEAL]	E. H. EWING.
[SEAL]	By J. C. THOMPSON, *Att'y*
[SEAL]	JOHN H. EWIN.
[SEAL]	JNO. T. PENDLETON.
[SEAL]	By JNO. H. EWIN.
[SEAL]	HENRY EWING.
[SEAL]	O. EWING, Jr.

[50 cent internal revenue stamp.]

Sealed and delivered in presence of, and approved by,

CONNALLY F. TRIGG,
U. S. District Judge, &c., Presiding in Circuit Court, M. D. of T.

13 On the 4th day of May, 1867, a bill of exceptions was filed, which is in the words and figures following, to wit:

Bill of exceptions.

M. H. HOWARD
vs.
ALBERT G. EWING, EDWIN H. EWING, Jr., John H. Ewing and John T. Pendleton.

On trial of this cause the plaintiff, to maintain on his part the issue joined on the pleadings, offered in evidence the two promissory notes described in the declaration, and filed therewith, and which are respectively in these words and figures:

Note 1st.

$3,333 30.

On or by the 15th day of April next, we, or either of us, promise to pay to M. H. Howard or order, at the Planter's bank of Tennessee, at Nashville, three thousand three hundred and thirty-three 30-100 dollars with interest at the rate of ten per cent per annum from and after the first day of September last until paid. Value received this 15th day of November, 1860.

(Signed) A. G. EWING.

(Signed) E. H. EWING & CO., *Sec'ty.*
(Signed) EWIN, PENDLETON & CO., *Sec'ty.*

2nd Note.

$3,687 76. NASHVILLE, *April 15th*, 1859.

On or by the 2rd day of November, A. D. 1861, we, or either of us, promise to pay M. H. Howard or order thirty-six hundred and eighty-seven 76-100 dollars. Value received.

14 (Signed) A. G. EWING.

(Signed) EWING & SPERRY, *Security.*
(Signed) EWING, PENDLETON & CO., *Security.*

This was all the evidence. The defendants moved for a new trial, and also in arrest of judgment, which motions are, upon consideration overruled. The defendants except to the judgment of the court overruling their motions for a new trial and in arrest of judgment, and tender this their bill of exceptions, which they pray may be signed, sealed, and made a part of the record, which is accordingly done.

[SEAL.] CONNALLY F. TRIGG,
U. S. District Judge, &c.

Bill of costs on file in papers, U. S. Circuit Court.

E. R. Campbell, clerk's fees	$21 90
E. R. Glascock, marshal's fees	14 00
J. P. White, atty's fees	00 00
	$35 90

Rec'd thirty-five 90-100 dollars in full of the above costs this Oct. 19, 1867.

E. R. CAMPBELL, *Clerk.*

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the sixth circuit and district of Middle Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said Circuit Court of the United States for the middle district of Tennessee, before you, between M. H. Howard and Albert G. Ewing, E. H. Ewing, jr., John H. Ewin, and J. T. Pendleton, a manifest error hath happened to the great damage of the said Albert G. Ewing, E. H. Ewing jr., John H. Ewin and J. T. Pendleton, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that
16 error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 7th day of May, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

[SEAL.] E. R. CAMPBELL,
Clerk Circuit Court of the United States
for the Middle District of Tennessee.

17 UNITED STATES OF AMERICA, *ss:*

To M. H. Howard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the

sixth circuit and Middle district of Tennessee, wherein Albert G. Ewing, E. A. Ewing jr., Jno. H. Ewin and J. T. Pendleton, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this the 7th day of May, in the year of our Lord eighteen hundred and sixty-seven, and of the independence of the United States the ninety-first.

CONNALLY, F. TRIGG,
U. S. District Judge &c., presiding.

18 Came to hand May 14th, 1867, and executed same day by making known contents to J. B. White, attorney of M. H. Howard, and delivering to him a copy of the citation.

E. R. GLASCOCK,
U. S. Marshal Mid. Dist. of Tennessee.

19 UNITED STATES OF AMERICA,
Middle District of Tennessee:

I, E. R. Campbell, clerk of the Circuit Court of the United States for said district, do hereby certify that the foregoing is a perfect, complete, and correct transcript of the case wherein M. H. Howard is plaintiff, and A. G. Ewing *et als.* are defendants, as appears from the records of said court.

I do further certify that the original writ of error, (marked pages 15 and 16,) and the citation, (marked 17 and 18,) are the originals which they purport to be, and that the same are signed respectively by the genuine signature of the U. S. district judge, and the return by the U. S. marshal.

I do further certify, that on May 7, 1867, the plaintiff in error, has filed in my office a copy of the writ of error endorsed as directed by law.

In testimony whereof, I have hereunto set my hand and the seal of said court, at office, in Nashville, this 23rd day of June, Anno Domini 1867, and of the independence of the United States the 91st year.

[SEAL.] E. R. CAMPBELL,
Clerk U. S. Circuit Court Middle Dist. of Tennessee.

O

SUPREME COURT OF THE UNITED STATES.

ALBERT G. EWING et. al., Plain'ffs in Error,
vs.
M. H. HOWARD, Defendant in Error.

Brief of Plaintiffs in Error.

The Plaintiffs in Error were sued in the Court below (Circuit Court of the United States for the Middle District of Tennessee,) in a single suit upon two several promissory notes, and judgment sounding in damages was recovered against them on 23d April, 1866. The Defendants moved for a new trial and in arrest of judgment, which motions were continued for argument until the April term, 1867, when said motions were overruled, and the Defendants thereupon prayed for and obtained a writ of error.

The first of the said notes is in these words and figures: "$3333 30. On or by the 15th day of April next, we, or "either of us, promise to pay M. H. Howard, at the Plant- "ers Bank of Tennessee, at Nashville, three thousand "three hundred and thirty-three dollars and thirty cents, "with interest at the rate of ten *per cent. per annum*, from "and after the first day of September last until paid. "Value received, this 15th day of November, 1860.

(Signed,) A. G. EWING,
E. H. EWING & CO., *Sec'ty*,
EWIN, PENDLETON & CO., *Sec'ty*."

See Bill of Exceptions, page 13, *of the Record.* The Act of 1860, ch. 41, (of the laws of Tennessee,) allowed ten *per*

cent. per annum to be taken for money loaned, provided that such agreement be expressed in the note or other written instrument evidencing the contract: and provided further, that any person who shall be guilty of loaning money at a greater rate of interest than ten *per cent. per annum*, shall forfeit to the debtor the entire amount of interest agreed to be paid. *Sections* 6 *and* 7 of the same Act provide that either the loaning of the money or the discounting of notes at a greater rate of interest than ten *per cent. per annum*, shall be a misdemeanor, rigorously defined and the punishment affixed, and also provide particularly that the illegal contract to exact the usurious interest shall make the offence complete. The said *Act of* 1860, *ch.* 41, went into effect on the first day of September, 1860, and was repealed by the Act of 31st January, 1861, which took effect from and after its passage. With the exception of the five months from the 1st of September, 1860, to 31st January, 1861, it has always been in Tennessee a misdemeanor to loan money or discount notes at a greater rate of interest that six *per cent. per annum*. *See Code of Tennessee, sec.* 4822.

The Plaintiffs in Error now respectfully insist that the aforesaid note is void, being an illegal contract for usury apparent upon its face. It expresses that it is made for value received on the day of its date, and yet calls for interest from a period two months and a half before that day, viz: from the day when the ten *per cent.* law took effect; making the rate of interest in effect more than thirteen *per cent. per annum*. In the case of Wetmore vs. Brien & Bradley, 3*d Head*, 725, which was a case in every respect similar to the present, the Supreme Court of Tennessee say, "The argument against this construction, that "the act does not, in terms, affect the contract, is of but "little force. This was not necessary. It is well settled "that a contract may be illegal, although not in contro-

"vention of the specific provisions of a statute, if it be "opposed to the general policy and intent thereof. 6 "*Bing. N. C.* 174. In the case of Begnis vs. Armistead, "10th Bing, 110, the principle is distinctly stated, and is "now well established, 'that every contract made for or "about any matter or thing which is prohibited and made "unlawful by statute, is a void contract, though the sta- "tute does not mention that it shall be so, but only "inflicts a penalty on the offender: because the penalty "implies a prohibition, though there are no prohibitory "words in the statute.' *Smith's Leading Cases. Vol.* 1, "*page* 284, *top*." This was but an affirmation of the leading Tennessee case of Isler vs. Brunson, 6th Humph., which is believed to be decisive of the case presented by this record: "If a party plaintiff, bring into a Court "either of Law or Equity, an illegal contract that it may "be enforced, and this illegality is shown and set forth by "himself and not disclosed by plea or allegation from the "defendant, it is the duty of either Court, on ground of "public policy, to repel the plaintiff and refuse its action "on his behalf. Thus, if in a declaration on a security for "money profert be made of the security, and upon its "face it appears to have stipulated for more than legal "interest, no judgment can be rendered for the plaintiff "notwithstanding the act of 1833 only avoids the usu- "rous excess." 6th Humph., 277–8.

If more were necessary to establish the point, to the satisfaction of the Honorable Court, that the Plaintiff in the Court below obtained judgment upon a note, the illegality of which appears upon its face, it might be added that the act of 1860, ch. 41, has been elaborately construed by the present Supreme Court of Tennessee, its constitutionality sustained, and the strict construction of it required. *See Caruthers, Ex'r., vs. Andrews, 2d Coldwell*, 385. "The law only makes such contracts legal, and

"will enforce them when made in conformity to law." *Same, p.* 390. This is said in reference to the requirement of the said Act, that to make the rate of ten *per cent.* legal, it must be so stipulated by the parties in writing. The present record contains a bill of exceptions showing that no testimony was introduced to explain the transaction, except the very promissory notes themselves. Should it be argued, however, that per possibility the note in question, although made on the fifteenth of November, is given for money, in fact, loaned on the first of September previous, it would be a sufficient answer that such loan upon an unwritten contract would have been wholly illegal, and brought the parties within the penalty of the statute.

N. M. Watterson

R. A. Crawford

for Pltffs. in Error

Supreme Court of the United States.

DECEMBER TERM, 1868.

ALBERT G. EWING AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

M. H. HOWARD,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

ROBERT L. CARUTHERS,
Attorney for Defendant in Error.

Judd & Detweiler, Printers, 517 Seventh St., near D.

Supreme Court of the United States.

DECEMBER TERM, 1868.

ALBERT G. EWING AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

M. H. HOWARD,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

The suit was brought in the circuit court of the United States at Nashville, against the plaintiffs in error, by the defendant, on two promissory notes; one for $3,333.30, dated 15th November, 1860, and due 15th April, 1861, with interest at the rate of 10 per cent. per annum, from the 1st of September, 1860, until paid. The other was for $3,687.76, dated April 11, 18—, and due 2d November, 1861. There was a verdict and judgment on the 23d April, 1866, for $9,902. At the same term—four days after the judgment, $2,445.60 were remitted, on account of a mistake in the calculation, leaving $7,458.45.

The case is brought to this court by writ of error. It is now insisted that the judgment should be reversed, because the first note is void, for usury on its face. It is admitted that the laws of Tennessee allowed a conventional interest of 10 per cent. at the time this note was given, and from the 1st day of September before. The note is in the words following:

"$3,333.30.

"On or before the 15th day of April next, we, or either of us, promise to pay M. H. Howard, or order, at the Planters'

Supreme Court of the United States.

DECEMBER TERM, 1868.

ALBERT G. EWING AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

M. H. HOWARD,
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BRIEF OF DEFENDANT IN ERROR.

The suit was brought in the circuit court of the United States at Nashville, against the plaintiffs in error, by the defendant, on two promissory notes; one for $3,333.30, dated 15th November, 1860, and due 15th April, 1861, with interest at the rate of 10 per cent. per annum, from the 1st of September, 1860, until paid. The other was for $3,687.76, dated April 11, 18—, and due 2d November, 1861. There was a verdict and judgment on the 23d April, 1866, for $9,902. At the same term—four days after the judgment, $2,445.60 were remitted, on account of a mistake in the calculation, leaving $7,458.45.

The case is brought to this court by writ of error. It is now insisted that the judgment should be reversed, because the first note is void, for usury on its face. It is admitted that the laws of Tennessee allowed a conventional interest of 10 per cent. at the time this note was given, and from the 1st day of September before. The note is in the words following:

"$3,333.30.

"On or before the 15th day of April next, we, or either of us, promise to pay M. H. Howard, or order, at the Planters'

Bank of Tennessee, at Nashville, three thousand three hundred and thirty-three dollars and thirty cents, with interest at the rate of 10 per cent., per annum, from and after the 1st day of September last, until paid. Value received, this 15th day of November, 1860." (Signed by plaintiffs in error.)

The conventional interest act only remained in force from 1st September, 1860, to 31st January, 1861, on which last day it was repealed. It provided that 10 per cent. should only be allowed on notes for borrowed money, or renewal of notes for money previously loaned. It was also required that the per cent. should be expressed on the face of the note.

The bill of exceptions shows that there was no evidence but the two notes, which are copied in the record following the declaration, as well as in the bill of exception. The guaranty of O. Ewing on each note is also copied on page 4 of the record, in which, after describing the note and his guaranty, he says, "said note being for money loaned heretofore by said Howard to my said son at my instance and request."

The defendants put in the plea of *nil debet*, and no other. There is no plea of usury; no such question is made either by plea or motion to dismiss the suit, or repel the plaintiff. There was no resistance below upon any ground, and it was supposed that the appeal to this court was merely for delay.

But now it is insisted that, as to the note of 15th Nov., 1860, it was erroneous to allow a recovery, because it appears on its face to be usurious, and therefore illegal and void. It is true that the Supreme Court of Tennessee have held in the case of Isler *vs.* Brunson, 6 Humph., 277, and other cases, that, although by the usury laws of the State since 1819, the principal and legal interest may be recovered where the usury is set up by plea, but where it appears on the face of the contract upon which suit is brought, the plaintiff will be repelled from the court on the principle that the courts will not lend their aid to enforce illegal contracts. This principle has an exception by statute, in cases of usury, except so far as excessive interest is concerned. This exception has been confined by construction in the case cited to cases where the usury has to be set up by plea and proof; but

where it is shown by the plaintiff himself in the contract on which he sues, the general rule as to illegal contracts is still enforced. This distinction may not seem very clear in view of the words of the statutes of usury to be found in the Code, sec. 1944. But it is well established. It is also true that all cases of usury under either aspect are misdemeanors and indictable by sec. 4822 of the Code.

The general rule, that all contracts made against the policy and interest of a statute are illegal and void without any express provision in the statute to that effect, as decided in the case of Wetmore *vs.* Brien and Bradley, 3 Head., 725, is not disputed. This would defeat all actions on usurious contracts if it were not for qualification of the law by the acts on that subject.

But the question here is, whether this note is illegal at all or not. That depends upon its conformity to the provisions of the act of 1860, making 10 per cent. legal if expressed on the face of the note. It is also required that notes should be for money loaned, or in renewal of notes for former loans of money. It is not allowed upon notes based upon any other consideration. But this objection can only be taken by plea, and that was not done in this case.

So, the only question presented for reversal by the plaintiffs in error is, whether the note of November 15, 1860, is illegal on its face, that is, does it conform to the provisions of the conventional interest act of that year? If not, it is obnoxious to the objection made.

All that the statute requires to appear in the note is the rate of interest agreed upon, if it be more than six per cent. This contract conforms to that requirement.

But it is argued that more than 10 per cent. is reserved, because the money was loaned on the 15th November, 1860, to be paid on the 15th of the next April, and was to bear interest from the 1st September preceding, that being the day when the act took effect. That is a question of construction. It is a well-settled rule that the courts will avoid that construction of a transaction which will impose a penalty, if practicable. They will not subject a party to a contract to a penalty, if by any fair

construction it can be avoided. If this note was for money loaned on or before the 1st September, 1860, it is legal, but if for a loan at the date of the note, it may be illegal, because it would make the interest more than 10 per cent. for the money loaned for the time it was to be retained. But if it was for a loan on 1st September, or before that time, it would be legal. The written guaranty of O. Ewing, page 4, shows that the note was for a previous loan. But independent of that, what would be the presumption. Surely, it would be that the loan was made at or before the time from which the interest was to begin to run. If so, it was legal under the statute.

If it be said, as it is, that a presumption arises that the money was loaned at the date of the notes, this is rebutted by the counter presumption that the money was loaned at the time it was agreed the interest should commence running. The first would make the contract illegal, the latter legal. By the first presumption or construction, the penalty of forfeiture would be inflicted by the statute; by the latter, the contract would be enforced, and justice done.

Now, can there be any doubt from the facts, that this note was given for a previous loan, and the interest to run at 10 per cent. from the time the statute allowed it? If this were not so, why was not the objection taken below by plea or motion, when the truth could have been ascertained without resorting to presumptions?

But I contend that on this writ of error, the court below cannot be put in the wrong, by the making of an objection here that was not made there. If the defendants desired to make such a defence as that now set up, it should have been done then, and the judgment of the court taken upon it. That would have made a question for this court of errors to sustain or correct. It is too late to make new questions after the case gets here. This court will only notice such points of objection as were presented and decided by the inferior court. This is a court to correct erroneous decisions made by the court below, on points of defence presented, and not for the origination of new defences, which the inferior court was not called upon to adjudicate.

Such is the rule in the Supreme Court of Tennessee, and I presume it is the same here.

But after all, I cannot but suspect that this question is made here to avoid the 10 per cent. interest allowed by the rules of this court, where a case is brought up *simply* for delay. If there had been a plea of usury, issue would have been taken, and the facts ascertained by proof. If a motion had been made to dismiss because the paper appeared on its face to be illegal, the court below would have made a decision for the revisory action of this court. But as the case is presented there is nothing for this court to act upon. But I have shown, as I think, that if the question raised is before the court, the result would be the same.

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